

IN THE GRAND COURT OF THE CAYMAN ISLANDS (Criminal)

HOLDEN AT GEORGE TOWN, GRAND CAYMAN,

BEFORE THE HON. MR. JUSTICE HULL.

DeWitt v. Regina

Mr. Norman Hill Q.C. and

Mr. Charles Quin for the appellant.

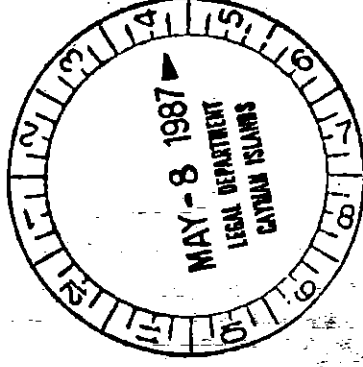
Mr. Brian Sharman for the Crown.

REASONS FOR JUDGMENT

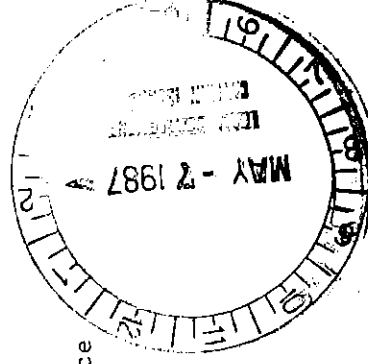
The appellant was convicted in the Summary Court on a charge of being in possession of ganja with intent to supply and on a charge of having unlawfully imported it into the Cayman Islands. The amount involved was something over 215lbs. It was found aboard a yacht which the appellant had sailed into the Islands with a crewman, Martinez. Two small quantities were, respectively, in a windbreaker and on a shelf. The remainder, which was the bulk of the ganja on board, was discovered in a sealed compartment behind a locker in the cockpit. On the charge of possession with intent to supply, he was sentenced to 5 years imprisonment and to a fine of \$10,000 (or one year's further imprisonment in default of payment). On the importation charge he was sentenced to a term of 2 years imprisonment, concurrent with the 5 year term, and a fine of \$500 (or 6 months in default). The vessel was forfeited to the Crown. He appealed against his convictions and sentences.

In respect of the conviction, the notice of intention to appeal relied on two grounds:

- (a) that the learned Magistrate had misdirected himself on the burden and standard of proof that applied (sic) under section 6(a) of the Misuse of Drugs Law;
- (b) that the verdict was inconsistent with all the evidence and so was unsafe and unsatisfactory, rendering a miscarriage of justice.



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At the hearing, Mr. Hill also relied on several supplementary grounds. I will deal with the grounds in the order in which Mr. Hill advanced them at the hearing.

His first supplementary ground was that the Magistrate wrongly admitted two highly prejudicial items of evidence. Consequently it could not be said that his decision was unaffected by that evidence.

The first was a photograph of Martinez, the crewman. It showed him on a boat holding an automatic firearm. It is not apparent to me from the appeal bundle, which is difficult to follow, that this became an exhibit but it was put in cross-examination to Martinez (who gave evidence for DeWitt) and he acknowledged its authenticity. Mr. Hill's complaint was that it was irrelevant to the charge against DeWitt, but that it nevertheless gave the impression that he was "guilty by association".

I quote Mr. Hill's words because in my view they show the limitations of the submission. "Guilty, by association, of what?", it might be asked. The photograph was put to Martinez in a particular context, which was the issue of his own credibility as a witness. Immediately beforehand he had denied ever being involved in crimes or in guns. Then the photograph was put to him. He went on to explain that he used guns "when we were on the high seas" to keep off pirates.

In itself, the use of the photograph does not go beyond testing Martinez' credibility. It has not been shown that the Magistrate regarded it as proving anything more far-reaching.

The other item of evidence was elicited by the Magistrate himself. At the end of Martinez' evidence (which also turned out to be the end of the defence case) he showed the witness a shirt. He apparently asked Martinez whether a motif on the front of it was of a ganja leaf. Martinez denied this. The prosecution had not put the shirt to him.

Mr. Hill submitted that by putting the shirt to the witness himself, and in effect asserting that it was a ganja leaf, the Magistrate would have given the impression to a reasonable observer in the gallery that he was himself not disinterested in the issue of DeWitt's guilt. I understood the point of his argument to be that the motif was not evidence against DeWitt, but that by choosing to lead evidence himself about it, the Magistrate was appearing to disclose signs either of unfairness or of pre-determination of the issue, the more because it was irrelevant. The appearance of fairness had not been observed. There should therefore be a new trial. He cited Whittaker and Watler v. R. 1984 CILR 153 as being in point. In reply, Mr. Sharman argued that as the Magistrate had not put the shirt to Martinez until the end of the defence case, by which time the Magistrate would have come to a view on the case,^a/reasonable onlooker could not have thought that any unfairness was involved.

The circumstances were not analogous to those in Whittaker and Watler.

The motif on the shirt was not in my opinion evidence that supported the charges against DeWitt. No one said it was a ganja motif. Even if it was, and the Magistrate could have taken notice of that fact, it did not take the case against DeWitt anywhere. Moreover the Crown's case was the DeWitt was trafficking covertly, and with some guile. It seems rather unlikely that his accomplice would have flaunted a connection with marijuana.

The proper inference to be drawn from the fact that the Magistrate did put the shirt to Martinez is, in my view, that he regarded it as being relevant to the case against DeWitt. The record shows that it was put to Martinez in the course of his evidence. It does not show that the defence had by then indicated that it was closing its case. It must follow that neither the Magistrate, nor anyone else present who was not privy to the defence, could have known that it had completed

its case. In that respect, the submission for the Crown, that this was an incident at the end of the day, after each side had completed its case and the Magistrate had come to a view, cannot be sustained.

I will return to this point below.

The next supplementary ground of appeal was that the Magistrate misdirected himself in finding that DeWitt admitted that the ganja on the boat belonged to both men.

The relevant portion of the Magistrate's reasons is as follows: "I am satisfied from all the facts of the case that these men were in this together, that they both knew that the ganja was on board. I accept the word of the police that accused" (i.e. DeWitt) "admitted that the ganja was to belong to both men".

In short, Mr. Hill's objections were these:

- (a) there was no evidence at all that DeWitt ever admitted to knowledge or ownership of the bulk of the ganja hidden behind the cockpit locker.
- (b) there was a conflict between the police officers as to which of the other two items of ganja he admitted to co-owning.

- (c) the Magistrates' conclusion, as expressed in his reasons, therefore rests on a misdirection as to the evidence.

It is perfectly clear from the notes of evidence that DeWitt never admitted knowledge of the bulk of the ganja. However, the Magistrate's reasons must be looked at in their overall context. The strongest point for the appellant is that the Magistrate, in the last sentence of his reasons, used the phrase "the ganja" without distinguishing between the various quantities. The appellant did not allege that the Magistrate became confused as to the extent of the admission. He was specifically, at this point in his reasons, referring to what the police officers

had said in evidence. They had never said that DeWitt admitted to knowledge of the bulk supply and I see no real reason to suppose that the Magistrate thought that they had. In the last two sentences in his reasons, I think he was to be taken as saying two things: first that on all the facts he believed that both men were involved, and secondly (and more particularly) that to the extent that the police said that DeWitt did make an admission, he believed them.

I would therefore hold that Magistrate did not in fact misdirect himself by finding that DeWitt made an admission in respect of the bulk supply.

That leaves, however, the difference between the police officers as to which of the two smaller quantities DeWitt made any admission of ownership of.

There is a difference in the evidence. Inspector Connor said that he was referring to the quantity in the windbreaker. Chief Inspector Dent said that he was referring to the quantity taken from the shelf. The Magistrate's reasons do not demonstrate that he considered the difference. However, I do not think that it matters. It is clear from the evidence that at this time the police and the two men were in the forward section of the yacht. Both officers said that it was DeWitt who went and got the quantity from the shelf, and both said that he did not do so as result of Martinez' motioning him towards it. There was therefore evidence on which the Magistrate could reasonably have found, first, that DeWitt himself knew independently that there was ganja on the shelf. Although it would have been more satisfactory, in the reasons given, to demonstrate that he was aware of the discrepancy in the evidence of the police officers, there was also evidence on which he could reasonably have found that at some point in the forward section DeWitt made an admission as to one of the smaller quantities, or indeed (if he thought Connor was correct) as to the one in the windbreaker. The words he used were

"the police". That does not necessarily mean "the police officers". It can also be a loose reference to prosecution evidence. I think it was, but in any event it was open to him to regard any inconsistency as immaterial in this respect. There was evidence that DeWitt by his conduct acknowledged at least one small quantity of ganja in the front section i.e. that on the shelf, and there was evidence that he made an admission in respect of ganja in that section.

The third supplementary ground was that the Magistrate misdirected himself in finding that there was evidence from which he could reasonably infer that DeWitt had participated in acquiring any of the ganja on the boat, that he knew of the bulk quantity behind the locker, that he was in possession with intent to supply the whole of the ganja on the boat, or that he was in possession with intent to supply the hidden bulk quantity.

Strictly speaking, if there was sufficient evidence to support the findings that DeWitt did import ganja into the Cayman Islands and was in possession of it in the Islands, where it was acquired from was immaterial. If there was not, otherwise, sufficient evidence of these things, then evidence as to whether or not DeWitt had participated in acquiring the ganja would be relevant to go towards showing whether or not he was guilty of importation and of possession in the Cayman Islands.

By themselves the two small quantities and their location indicate possession for personal use. The graver feature of the charges was, of course, the hidden bulk quantity but it does not follow that the presence of the small quantities was irrelevant to the charges.

The evidence in this case would clearly support the following findings:

- (a) That DeWitt was the skipper of the yacht.
- (b) That he sailed it from Jamaica to the Cayman Islands

with one crewman, Martinez.

- (c) That hidden aft, behind a locker, there was a cache of ganja, so substantial that whoever had control of it intended to supply it.
- (d) That to DeWitt's knowledge, there were small quantities of ganja in the forward section, at least one of which he co-owned with Martinez.
- (e) That his travel documents contained no record of him entering or left Jamaica.
- (f) That both men represented, separately, to the Cayman authorities that they had sailed from Great Inagua in The Bahamas, which was in fact untrue.
- (g) That although the bulk quantity was hidden between the locker, it could be seen, by anybody who have occasion to look at the locker wall behind which it was hidden, that this had been filled in with fibre glass of a different appearance to the other wall.

Mr. Hill's submissions under this heading were, first, that the admission in respect of a smaller quantity did not lead inescapably to the inference that DeWitt knew of the bulk quantity or that he was part of a joint enterprise, that the prosecution having in fact proved that the smaller amounts were for personal use, they could not logically or probatively be evidence of possession of anything with intent to supply, that there was no direct evidence that he knew of the bulk quantity, and that his control of the boat only raised a presumption of possession, nor of an intention to supply.

So far as events in Jamaica were concerned, he submitted, the only evidence before the court was that of the defence witnesses. There was no evidence to connect DeWitt with the resealing of the wall behind which the bulk quantity was

hidden. That quantity was not readily accessible or visible to anyone who have no reason to know or suspect that it was there. No presumption of law amounted to proof beyond reasonable doubt. There was not, all in all, sufficient evidence from which the Magistrate could infer beyond all reasonable doubt that DeWitt was in possession of the bulk quantity with intent to supply, even by relying on section 7 (1) (b) of the Misuse of Drugs Law. The Magistrate's reasons showed that he had not infact invoked that provision. He had found as a positive fact, as it were, that both men knew what was aboard. This court, on this appeal, ought not to adopt the other approach, i.e. of invoking the presumption.

There was sufficient evidence adduced by the Crown itself from which the Magistrate might reasonably infer, as he did, that the two men were acting in concert, that they both knew that all of the ganja was aboard when the vessel came into the Cayman Islands, and that they were in possession of the hidden bulk quantity with intent to supply it. There is nothing, under this head of appeal, to show that the Magistrate drew incorrect inferences. He observed the appellant and his witnesses testify. He was entitled to disbelieve them. In those circumstances, their testimony could not detract from the prosecution case.

For the same reasons, I think he was also entitled to find that DeWitt imported the drugs into the Cayman Islands, which was the issue to which the fourth supplementary ground of appeal was directed.

The fifth supplementary ground was that in relation to the charge of possession with intent to supply (1343/86) no plea had ever been taken.

The Crown did not dispute that this appeared to be the case. Nor, however, did the otherside dispute that the trial had proceeded on the charge on the basis that a plea of not guilty

had been entered.

Mr. Hill said that because of the failure to record a plea, the conviction should be set aside. The requirement to take it was mandatory. He cited Gonzales and Suarez v. R. 1984 CILR 10 as being analogous.

Mr. Sharman said that it did not matter. The appellant had been heard fully in his defence, notwithstanding the absence of any formal plea on the charge of possession with intent to supply, as if he had pleaded not guilty.

Gonzalez and Suarez was not in point. In that case, the appellants had been denied access to a forum that they were entitled to choose. Here, that was not the case and the omission to take a plea was a matter of form only, with no practical consequences that operated against DeWitt.

R. v. Williams [1977] 1 All E.R. 874 was exactly in point. It was clear authority for the proposition that the oversight did not matter.

I agree with Mr. Sharman that Williams is authority which I ought to follow for the proposition that, where no plea is taken from a defendant on the outset of a summary trial but the trial proceeds on the basis that he has pleaded not guilty and the omission does not affect the outcome, it is not in itself a sufficient ground for a re-trial. There are, however, further comments that I want to make on this point in this case in the context of the second of the two original grounds of appeal against conviction.

In his submission, Mr. Hill did not specifically argue the first of the original grounds of appeal as such, and I took his submission under the various heads of supplementary grounds to subsume and cover this.

He did, however, in addition to everything else, rely on the grounds that the verdict was inconsistent with all the ^{that} evidence before the Summary Court, and consequently/it was unsafe and unsatisfactory.

I must therefore consider this. In fact I will go a little further. The use of the word "consequently" limits his submission. I will also consider whether, overall, the conviction can properly be said to be unsafe or unsatisfactory, so that it should be quashed or a new trial ordered.

Notwithstanding my findings on the individual heads of appeal already dealt with in this case, the facts are that no plea was taken on one charge; the Magistrate, before the conclusion of the defence case, himself "led" evidence on what was an irrelevant consideration, (i.e. the motif on the shirt); and to arrive at the conclusion that he did not in fact misinterpret the evidence as to what it was that DeWitt admitted to, it is necessary to draw inferences from his given reasons.

Although they fall to be tried summarily, these are very serious charges. The maximum penalties are very heavy. The result of the trial is that DeWitt has been sentenced to a substantial term of imprisonment and to heavy fines. There is a great deal of difference between an offence which carries a maximum term of imprisonment of 15 years, as well as heavy fines, and the usual kind of summary offence.

So far as the apparent lack of a plea to the charge of possession with intent to supply was concerned, it was assumed for the purpose of this appeal that the record was in fact correct. It may be that in fact a plea was taken, but inadvertently omitted from the record. Whether or not that was so in this case, I do not interpret Williams as meaning anything more than that, where no adverse consequences flow from an omission to take a plea, it is not a sufficient ground for a re-trial.

It is still important to observe the formalities of trial procedures, the more so when the charge is a serious

one. Williams does not say otherwise.

If I am correct in my interpretation of the Magistrate's thinking, as revealed by his reasons, it also has to be said that they are elliptical. In many summary cases that in the nature of things, but the more serious the charge, the greater is the need to demonstrate the reasons for the decision. Where, as in this case, it involves very serious allegations and consequences, it is in my view important to do so as explicitly as possible.

In this case, both overall and on the somewhat narrower basis argued by Mr. Hill, I do not however consider that the appellant's convictions can be said to be unsafe or unsatisfactory. The strongest point made in his favour was, in my view, the Magistrate reference to the shirt. As against that, however, I also think that the evidence against DeWitt was very strong. I have no doubts of his guilt and I do not consider that there has been any miscarriage of justice.

For these reasons, I dismissed the appeal against the convictions.

In relation to the sentences, DeWitt's age and his lack of previous convictions are matters in his favour. He was dealing in marijuana, and not in cocaine, which is currently the drug which is causing the most concern here.

Nevertheless he was not trafficking illegally in drugs but also (because it is clear/^{only}from the evidence that this was so) using the Cayman Islands as a staging point for a transshipment of a substantial nature. Anyone who does that must by now be taken to know that he is engaged on a dangerous enterprise, not only for his eventual customers, but also for himself. To use the Cayman Islands as a staging post is an aggravating factor and should be understood as such by those in the trade.

In those circumstances, a plea of relative youth and of a previously clear record have to be looked at critically.

They are not bargaining factors to be used to minimise the damage that flows from a commercial risk taken and lost. In this case, to the extent that they are relied upon to show that DeWitt was a young, clean-cut man who did not fully appreciate the nature of what he was getting into, I would only give them very limited weight.

Earlier sentencing precedents are also of limited value, especially with the passage of time. Marijuana is not the same thing as cocaine, but any sort of drug trafficking which involves the use of the Cayman Islands in an international transaction is currently a matter of very considerable concern. Although the quantity involved does have a bearing on sentence, there is no precise scale in this respect, on which traffickers can safely rely to cut their losses. Within broad bands, quantity is one factor but there are also others. It is the overall circumstances which determine sentence.

In this case, Martinez was the crewman. He had pleaded guilty, which was a mitigating factor. DeWitt's sentences were somewhat higher than those awarded to other persons who have been convicted of trafficking in similar amounts of marijuana but I do not consider that, at this time, it can be said that they were manifestly excessive. I agree with the learned Magistrate's judgment.

I therefore also dismissed the appeal against the sentences.

D. Hull

David Hull

6th May, 1987